Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

80-588

IN THE

Supreme Court of the United States

October Term, 1980

KRAMER MOTORS, INC., a California corporation,

Petitioner,

vs.

BRITISH LEYLAND, LTD., BRITISH LEYLAND INTERNATIONAL, LTD., and BRITISH LEYLAND MOTOR CORPORATION, LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

DID THE COURT OF APPEALS ERR BY HOLDING THAT THE CONSTITUTION REQUIRES THAT A SUBSIDIARY BE THE "ALTER-EGO" OF ITS PARENT FOR THE EXISTENCE AND NATURE OF THE PARENT-SUBSIDIARY RELATIONSHIP TO HAVE RELEVANCE TO DETERMINING WHETHER MINIMUM "CONTACTS" AND "AFFILIATING CIRCUMSTANCES" EXIST TO PERMIT THE EXERCISE OF PERSONAL JURISDICTION OVER THE PARENT? INSTEAD, SHOULDN'T THE COURT HAVE HELD, THAT,

UPON AN EVALUATION OF ALL "AFFILIATING CIRCUMSTANCES" IT IS FAIR AND REASONABLE TO EXERCISE PERSONAL JURISDICTION OVER THE FOREIGN DEFENDANTS?

THE PARTIES.

The caption of the Petition for Certiorari accurately reflects the identity of the parties.

TABLE OF CONTENTS

	Page
Question Presented	i
The Parties	ii
Opinions of the Courts Below	1
Grounds for Supreme Court Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
A. Federal Jurisdiction	2
B. The Parties	2
C. The Complaint	3
D. Facts Relevant to Personal Jurisdiction	3
a. The "Alter-Ego" Concept Is Inappropriate in the Analysis of the Constitutional Propriety of the Exercise of Personal Jurisdiction	4
b. The Fact of Ownership, the Nature and Quality of the Parent-Subsidiary Relationship and the Function Played by the Subsidiary, and the Relationship of These Facts to the claims, Are All "Affiliating Circumstances" Which, Satisfy Due Process Requirements	10
Conclusion	14

INDEX TO APPENDICES

	Page
Judgment	App.p. 1
Order of Dismissal, Filed: Sept. 5, 1978	1
Opinion of the United States Court of Appeals for the Ninth Circuit	3
Notice of Entry of Judgment	9
Order Amending Opinion	11
Order Filed: April 28, 1980	13
Order Filed: June 19, 1980	14
Statutes Involved	15
Order Filed: June 4, 1980	20
Amended Order Filed: June 30, 1980	21

TABLE OF AUTHORITIES

Cases — Page

Athletes Foot of Del. v. Ralph Libonti Co., 445 F.Supp. 335 (D.C. Del. 1978) 14

Briggs v. Goodwin, 569 F.2d 4 (D.C. Cir. 1977) 6

Brunett Machine Works, Ltd. v. Kolchum industries, Inc., 406 U.S. 706 (1972) 6

Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) 5

Caribe Trailer Systems v. Puerto Rico Maritime Shipping Auth., 475 F.Supp. 711 (D.C.D.C. 1979) 13, 14

Celtronics Data Computer Corp. v. Mannesman, A.G., 432 F.Supp. 659 (D.C.N.H. 1977) 13

Dominicus Americana Bohio v. Gulf & Western industries, 473 F.Supp. 680 (S.D.N.Y. 1979) 13

Duple Motor Bodie, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969) 8

El Cid Ltd. v. The New Jersey Zinc Co., 444 F.Supp. 845 (S.D.N.Y. 1977) 14

Energy Reserves Group, Inc. v. Superior Oil Co., 460 F.Supp. 483 (D. Kan. 1977) 11

Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir. 1979) 6

Hanson v. Denckla, 357 U.S. 235 (1958) 8, 9

Hutchinson v. Chase & Gilbert, 45 F.2d 139 12

International Shoe Co. v. State of Washington, 326 U.S. 310 (1945) 5, 8

Maricopa County v. American Petrofina, Inc., 232 F.Supp. 467 (N.D. Cal. 1971 12

McGee v. International Life Insurance Co., 355 U.S. 220 (1957) 7, 8

Mississippi Pub. Co. v. Murphie, 326 U.S. 438 (1946) 6

Page

Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 13

Novak v. Rexroth GmbH., ... F.Supp. .... (N.D. Ill. 1979) (1979-1 Trade Cases, para. 62,630 13

Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92 (C.D. Cal. 1979), aff'd 461 F.2d 1261 (9th Cir. 1972) 13

Outboard Marine Corp. v. Pezetel, 474 F.Supp. 168 (D.C. Del. 1978) 13, 14

Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437 (1952) 8

Ramamurti v. Rolls-Royce, Ltd., 454 F.Supp. 407 (D.C. D.C. 1978) 13

Shaffer v. Heitner, 433 U.S. 186 9

Sherman v. British Leyland Motors, Ltd., 601 F.2d 429 (9th Cir. 1979) 2

Superior Coal Co. v. Ruhrkole, A.G., 83 FRD 414 (E.D. Pa. 1979) 13

Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950) 8

United States v. Diebold, ... F. Supp. .... (N.D. Ohio 1978) (1978-2 Trade Cases, paras. 61,831-61,832) 13, 14

United States v. General Motors Corp., 384 U.S. 127 (1966) 12, 13

World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286 100 S.Ct. 559 (1980) 5, 6, 7, 8, 9

Constitution

United States Constitution, Fifth Amendment 6

United States Constitution, Fourteenth Amendment 6

Page

Miscellaneous

U.S.A. Outline Plan for Revised BL Distribution (April 4, 1972) 4
United States Constitution, Fourteenth Amendment 6

Statutes

Clayton Act, Sec. 3 ..... 1, 2
Clayton Act, Sec. 4 ..... 1, 2
Clayton Act, Sec. 7 ..... 1, 2
Clayton Act, Sec. 12 1
Clayton Act, Sec. 16 ..... 1, 2
Sherman Act, Sec. 1 ..... 1, 2
United States Code, Title 15, Sec. 1 ..... 1, 2
United States Code, Title 15, Sec. 8 ..... 1, 2
United States Code, Title 15, Sec. 14 ..... 1, 2
United States Code, Title 15, Sec. 15 ..... 1, 2
United States Code, Title 15, Sec. 17 ..... 1, 2
United States Code, Title 15, Sec. 22 ..... 1, 6, 7
United States Code, Title 15, Sec. 26 ..... 1, 2
United States Code, Title 28, Sec. 1254(1) 1
United States Code, Title 28, Sec. 1391 7
United States Code, Title 28, Sec. 1391(d) 6
United States Code, Title 28, Sec. 1605(a)(2) 13
Wilson Tariff Act, Sec. 73 ..... 1, 2

OPINIONS OF THE COURTS BELOW.

There is no opinion relating to proceedings in the District Court. The order of dismissal appears at Appendix, p. 1. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at .... F.2d .... (9th Cir. 1980) and at 1980-1 Trade Cases, paragraph 63,261. (Appendix, p. 3). The Opinion was amended on May 30, 1980 and June 3, 1980, after the Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed. (Appendix, p. 11).

GROUNDS FOR SUPREME COURT JURISDICTION.

Judgment was entered on April 1, 1980 (Appendix, p. 1). A timely Petition for Rehearing was filed. On April 28, 1980, the Court of Appeals ordered that the response of Respondents, if any, to the Petition for Rehearing, etc., be filed on or before April 11, 1980 (Appendix, p.13). The Petition for Rehearing, etc., was denied by the Court of Appeals on June 19, 1980. On August 28, 1980 Mr. Justice Rehnquist extended the time to and including October 14, 1980 in which to petition this court for a Writ of Certiorari.

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED.

Involved in this case are Section 1 of the Sherman Act, Section 73 of the Wilson Tariff Act, and Sections 3, 4, 7, 12 and 16 of the Clayton Act, codified at 15 U.S.C. §§1, 8, 14, 15, 17, 22 and 26, respectively, and are set forth in full at Appendix, p. 15.

STATEMENT OF THE CASE.

A. Federal Jurisdiction.

The Complaint was filed in the United States District Court for the Southern District of California. Federal Jurisdiction exists pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26). The Complaint seeks damages and injunctive relief for violations of Section 1 of the Sherman Act, Section 73 of the Wilson Tariff Act, Sections 3 and 7 of the Clayton Act (15 U.S.C. §§1, 8, 14, and 17).

B. The Parties.

Petitioner, KRAMER MOTORS, INC. (hereinafter "Kramer"), is a multi-line automobile dealership located in Santa Monica, California (CT 2). Respondents are incorporated and domiciled in Great Britain. (British Leyland Motor Corporation, Ltd. (BLMC), British Leyland International, Ltd. (BLI), and British Leyland Ltd. (BL).) At all times relevant to the substantive matters alleged, (i.e., 1973-1974), BLMC headed the British Leyland world-wide group which manufactured and distributed Triumph, MG, Austin and Jaguar. At that time, BLI was a wholly-owned subsidiary of BLMC in charge of overseas (i.e., export from Britain) distribution. The third defendant, (BL) headed the British Leyland group at the time of filing the Complaint.

Named as co-conspirators[1] were various corporations incorporated and domiciled in the United States involved in the importation and wholesale distribution in the United States of British Leyland manufactured vehicles. So named

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[1]In an earlier suit, petitioner sued these co-conspirators. Judgment for defendants on the merits was reversed by the Ninth Circuit Court of Appeals, *Kramer Motors, Inc. v. British Leyland Motors, Inc., et al.* (hereinafter *Kramer I*, Appendix, p. 20,), on the authority of *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429 (9th Cir. 1979). *Sherman* was a claim by another cancelled dealer. The British respondents herein, were not served in *Sherman* or in *Kramer I*.

was British Leyland Motors, Inc. (BLMI), the United States importer of the automobiles, a wholly-owned subsidiary of the British corporation, BLI.

C. The Complaint.

The Complaint alleges a scheme in violation of the antitrust laws to reduce both interbrand and intrabrand competition by realignment of the wholesale and retail distribution network of British Leyland manufactured automobiles. The Complaint alleges the purpose and effect of the plan was to raise and stabilize the wholesale and retail prices of British Leyland products, to restrain retail price competition between those British Leyland makes, such as MG and Triumph, which more directly competed with one another, to tie the lesser-selling or less popular British Leyland products to Triumph and Jaguar, the makes having greater public acceptance in the United States, and to prevent head-to-head competition between British Leyland products and the products of other manufacturers through the use of full-line forcing. Petitioner alleged that his dealership was cancelled pursuant to the scheme. (CT 4-5).

D. Facts Relevant to Personal Jurisdiction.

The limited factual record was composed of Respondents' answers, including exhibits, to interrogatories (CT 155-201); and various declarations of counsel and representatives of the parties. (CT 276-298; 35-43; 44-46; 47-50).

As relevant here, BLMI (U.S.) interfaced with the British Leyland group (G.B.) specifically on the reorganization and pricing, and more generally, as do any manufacturer and its marketing arm. Furthermore, members of the British Leyland group (G.B.) had significant direct dealing in the United States.

This case arises from the reorganization of the United States distribution system as recommended in a document entitled *U.S.A. Outline Plan for Revised BL Distribution*, dated April 4, 1972 authored by the then President of BLMI (U.S.). (CT 277-281). This plan could not be implemented without the approval of the British group. Approval was given at a meeting of BLI's (G.B.) Board of Directors and the plan was implemented in the United States. (CT 17-18). Both before and after the reorganization the British Leyland distribution system was composed of distributors, both independent and owned by BLMI, and retail dealers, and extended throughout the United States.

More generally, BLI (G.B.) and BLMI (U.S.) had interlocking boards of directors and executives of the English companies made regular visits to the U.S. subsidiary for consultations on budgeting and pricing matters. BLI (G.B.) reviewed and passed on all major policy decisions and exercised general executive control over BLMI (U.S.). The "group" (G.B.) also guaranteed obligations of BLMI (U.S.) owed to U.S. banks. (CT 162-163; 295-298).

During the period 1968 to 1974 petitioners directly sold and distributed tractors, marine engines and intra-city buses in the United States. United States residents regularly purchased BL products for delivery by respondents in Great Britain. (CT 246, 298; CT 297).

Thus, the "BL group" (G.B.) had substantial and regular contact with the United States.

a. The "Alter-Ego" Concept Is Inappropriate in the Analysis of the Constitutional Propriety of the Exercise of Personal Jurisdiction.

The Ninth Circuit Court of Appeals erred in holding that it was necessary that BLMI (U.S.) be the "alter-ego" of the British corporations. Decisions of this Court mandate

that the Court of Appeals was obligated to consider the totality of the circumstances, including the fact of ownership of the United States subsidiary, the business relationship between parent and subsidiary, and the nature of the function played by the subsidiary in the business of the parent. Thus analyzed, the most stringent meaning of "fairness" is satisfied.

The "alter-ego" doctrine in personal jurisdiction cases derives from *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). *Cannon* long pre-dated this Court's decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), and was decided at a time when due process was only satisfied where defendant was "present" in the forum.

Cannon is one of many cases that defined the parameters of "doing business" within the forum by a non-resident corporation so as to warrant the inference of "presence". "Presence" determined amenability to domestic service of process. A *Cannon* type analysis was necessary absent a statute permitting extraterritorial service of process.

International Shoe Co. v. Washington, and its progeny, through *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980), substitute a qualitative analysis for the quantitative analysis of "presence". It is in this particular aspect that the Court of Appeals erred, for it held that "the parent and subsidiary have dealt with each other as distinct corporate entities." Rather, it should have relied on the qualitative nature of the relationship.

World-Wide Volkswagen Corp., distilled the due process considerations involved in the exercise of *in personam* jurisdiction by State Courts. The analysis differs only

slightly because this is a federal question case and Congress has authorized extraterritorial service of process.[2]

Fourteenth Amendment due process regulates interstate federalism, protecting the sovereignty of each state, and guarantees against inconvenient litigation. *Id.*, 100 S.Ct. at 564-66. Since Fifth Amendment due process does not encompass the first of these considerations, the minimum "affiliating circumstances" constitute due process fairness.

"Inconvenience" in this day of virtually instant world-wide communication and jet-speed travel is no longer of constitutional importance.

> "The burden on the defendant, while also a primary concern, will in an appropriate case be considered in light of other relevant factors including the forum State's interest in adjudicating the dispute, see *McGee v. International Life Insurance Co.* [citation omitted]; the plaintiff's interest in obtaining convenient and effective relief, see *Kulko v. Superior Court* [citation omitted], at least when that interest is not adequately protected by the plaintiff's power to choose the forum,

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[2]15 U.S.C. §22 authorizes extraterritorial service of process. The Court of Appeals grudgingly acknowledges the implications. See, *Mississippi Pub. Co. v. Murphie*, 326 U.S. 438, 442 (1946); *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979) and *Briggs v. Goodwin*, 569 F.2d 4 (D.C. Cir. 1977) in addition to the cases cited by the Court of Appeals.

The venue provision of 15 U.S.C. §22 is inapplicable here. Venue is controlled by 28 U.S.C. §1391(d) which provides: "An alien may be sued in any district."

In *Brunett Machine Works, Ltd. v. Kochum Industries, Inc.*, 406 U.S. 706 (1972), this Court said:

> ". . .The principle of Section 1391(d) cannot be confined in its application to cases that would otherwise fall under the general venue statute. For, Section 1391(d) is properly regarded as a declaration of the long established rule that suits against aliens are wholly outside the operation of all Federal venue statutes, general and special."

cf. *Schaffer v. Heitner* [citation omitted]; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see *Kulko v. Superior Court* [citation omitted]."

* * * * * * * * *

"The limit imposed on state jurisdiction by the Due Process Clause in its role as a guarantor against inconvenient litigation have been substantially relaxed over the years. As we noted in *McGee v. International Life Co., supra,* at 222-223, this trend is largely attributable to a fundamental transformation in the American economy; . . ."

* * * * * * * * *

"The historical developments noted in *McGee,* of course, have only accelerated in the generation since that case was decided." *Id.,* at pp. 564-565.

Each factor discussed in *World-Wide Volkswagen Corp.,* as diminishing the importance of "inconvenience" has an analog here. The interest of the United States in seeing that its citizens receive redress under its antitrust laws is equivalent to the interest of the State of California in seeing that Mrs. McGee had a forum. *McGee v. International Life Insurance Co.,* 355 U.S. 220, 223 (1957). Likewise, it is in the interest of the Federal judicial system to see that petitioner obtains convenient and effective relief, where, as here, that interest is not adequately protected by the power to choose another forum. The United States District Court is the only forum in which the claim can be litigated.[3] And

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[3]This aspect particularly shows the unfairness of the result reached by the Court of Appeals. Given the same intercorporate relationship, the foreign corporate parent may escape scrutiny and the United States resident corporate parent will not. There is always venue in one district — that in which the domestically domiciled corporate parent is resident. 15 U.S.C. §22, 28 U.S.C. §1391.

the antitrust laws under which this case is brought, embody policies at least as fundamental as those advanced by a state in providing a forum in which to litigate personal injury actions, e.g., *Duple Motor Bodie, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969).

The Court of Appeals disregarded thirty-five years of teaching of this Court in holding "presence" necessary. *International Shoe Co.* and its progeny start with the premise that defendant is not present within the forum. Instead, there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum. *Hanson v. Denckla*, 357 U.S. 235, 253-54 (1958). Yet there is no requirement that these activities be conducted physically in the forum, personally by the non-resident defendant. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1951). Due process may be satisfied and jurisdiction may be constitutionally exercised over a non-resident who has no physical contacts with a forum. *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643 (1950). Similarly, jurisdiction may be predicated on a non-resident's activities in the forum even when they bear no relation to plaintiff's claim. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437, (1952).

In *World-Wide*, the Court dealt with the question of personal jurisdiction over a foreign manufacturer who distributes products in the U.S. through a regular distribution system. There is no perceptible difference in the analysis if one link in the distribution chain is a subsidiary of the foreign manufacturer, or the action is based on the antitrust laws rather than negligence, or strict liability in tort.

Twice, this Court said that a manufacturer of a product who directly or *indirectly* utilizes the stream of interstate commerce for distribution of its product subjects itself to jurisdiction for consequences arising from those distribution

activities. Holding that such a manufacturer "purposely avails itself of the privilege of conducting activities within the forum state, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)," the Court said:

> ". . . Hence if the sale of a product of a manufacturer . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer . . . to serve, directly or *indirectly*, the market for its product . . . it is not unreasonable to subject it to suit . . . The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. . . ." *Id.*, at p. 567. [Emphasis added.]

Again, in explaining why there were no "affiliating circumstances" which would subject World-Wide Volkswagon Corporation to the personal jurisdiction of the Oklahoma State Courts, the Supreme Court said:

> ". . . Nor does the record show that they [the distributor and retailer] regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they *indirectly, through others, serve or seek to serve the Oklahoma market*." *Id.*, at p. 566. [Emphasis added.]

The Court of Appeals erroneously required a direct participation by the British parent in the United States market, i.e., "presence." The analysis of "alter-ego" and "agency" was unnecessary because those are concepts of "presence" or "doing business", are not of due process significance, and were specifically disapproved in *World-Wide Volkswagen Corp.* and *Shaffer v. Heitner*, 433 U.S. 186 at 212-213. (". . . all assertions of State Court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny").

b. The Fact of Ownership, the Nature and Quality of the Parent-Subsidiary Relationship and the Function Played by the Subsidiary, and the Relationship of These Facts to the Claim, Are All "Affiliating Circumstances" Which Satisfy Due Process Requirements.

The Court of Appeals did not examine the intercorporate relationship other than to determine the applicability of the "alter ego" doctrine. The facts show, however, that the British had general executive responsibility for distribution and marketing in the United States, and their participation in the alleged conspiracy.

The Court of Appeals should have treated ownership of the United States importer as a contact with the forum and accorded weight to the relationship that *did* exist between parent and subsidiary.

> ". . . For jurisdictional purposes, the fact of the existence of the relationship — however substantial or attenuated the relationship may be — is a minimum 'contact, tie or relation' with the forum that may render possible the constitutional exercise of jurisdiction if the relevant factors, including the convenience and the orderly administration of the laws balance in that direction. The mere existence of the relationship is one factor."
>
> * * * * * * * *
>
> "The nature of the intercorporate relationship, or the relationship between a corporation and its owner, is highly probative of the 'quality and nature' of the non-resident's contact with the forum through an affiliated corporation."
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> * * * * * * * *
>
> ". . . [T]he presence in the forum of an affiliated corporation that directs or provides funds or benefits to a non-resident as a 'contact, tie or relation' of that non-resident with the forum. Either represents a 'commer-

> cial act' or relationship that connotes [an] intent to obtain [or an] expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction. *Kulko, supra* 436 U.S. at 101,. . .'' *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F.Supp. 483, 507-508 (D Kan. 1977).

The Court of Appeals accurately described the facts, but ignored their manifest legal effect:

> ''The record reveals the following: At various times, some directors of the British defendants have sat on the board of BLMI, the United States importer subsidiary. From 1971 to 1975 the president of BLMI served as a director of BLIL, its British parent (see n. 2). At times relevant to this action, BLIL was generally responsible for the sale of British Leyland products outside the United Kingdom, had general executive responsibility for the operation of BLMI, and reviewed and approved its major policy decisions. BLIL has guaranteed obligations of BLMI to United States banks. *Executives of the British companies work closely with executives of BLMI on pricing of vehicles for the United States market and sometimes travel to the United States for talks on pricing*. United States residents, through a 'personnel export screen,' can originate a car purchase through BLMI, then go to Europe on vacation, pick up the car there and bring it back to the United States. *BLIL approved the BLMI proposal for consolidating distribution of British Leyland vehicles within the United States*.'' [Emphasis added]:

BLMI (U.S.) existed only to market the products manufactured by British Leyland (G.B.):

> ''Up to this point no serious attempt to rationalize the distribution on a nationwide basis has been made owing to the necessity of substantially compensating discon-

tinued distributors or face the very real threat of expensive and time consuming litigation and the risk of heavy damages.

* * * * * * * *

Furthermore, the priority has been seen in recent years, following the formation of the British Leyland United States subsidiary to maximize the profitability to the company and *take no steps that could seriously jeopardize, even over the short term, sales volumes on which MG Jaguar and Triumph sports car production depends*. Consequently only two distributors have been terminated since 1969, on mutually agreed terms and without interruption in sales." (CT 278); [emphasis added].)

The logical imprecision of the Court of Appeal's analysis is self-evident. If the foreign corporation is "present", there is no need to analyze the facts in terms of "minimum contacts" or "affiliating circumstances." *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141. Conversly, the Court of Appeals ignored the significance of approval of the reorganization of the U.S. distribution system and participation in establishing wholesale and retail prices in the U.S., as originating and effectuating an antitrust conspiracy.[4] *United States v. General Motors Corp.* 384 U.S. 127, 142-143 (1966). Thus, the "minimum contacts" or "affiliating circumstances" actually gave rise to petitioner's claim.

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[4]". . . [T]he effects of [the alleged conspiracy] would be no different from those generated by a conspiracy formed in London. A conspiracy, no matter where made, creates a destructive force which extends into the state." *Maricopa County v. American Petrofina, Inc.*, 232 F. Supp. 467, 469 (N.D. Cal. 1971).

The Court of Appeals showed a remarkable degree of solicitousness for the British defendants.[5] The unnecessary constitutional imperatives adopted by the Ninth Circuit virtually immunize foreign corporations who "have business" in the United States by virtue of the activities of subsidiaries. Petitioner, on the other hand, has no remedy against these defendants. "Fairness" has hardly carried the day.

This is not an isolated problem. Only one reported antitrust case comes close to the proper analysis and thus the proper result. *Celtronics Data Computer Corp. v. Mannesman, A.G.*, 432 F.Supp. 659 (D.C.N.H. 1977). On the other hand, the cases contain as many different formulations as there are cases. E.g., *Superior Coal Co. v. Ruhrkole, A.G.*, 83 FRD 414 (E.D. Pa. 1979); *Dominicus Americana Bohio v. Gulf & Western Industries,* 473 F.Supp. 680 (S.D.N.Y. 1979); *Caribe Trailer Systems v. Puerto Rico Maritime Shipping Auth.*, 475 F.Supp. 711 (D.C.D.C. 1979); *Novak v. Rexroth GmbH.*, ... F.Supp. .... (N.D. Ill. 1979) [1979-1 Trade Cases, para. 62,630]; *United States*

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[5]The Court differentiated between the three British defendants, a position not argued by the defendants who referred to themselves as the "British Leyland Group." This characterization is from the record in *Kramer I* which was before the Court of Appeals. By doing so, material direct activities in the United States by members of the "Group" were deemed irrelevant.

Noting that the British Government owns 95% of BL, the Court of Appeals cited *Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964) in an attempt to involve the British Government so as to invoke the act of state doctrine. While the Court certainly had the power to raise, on its own motion, both subject matter jurisdiction and the act of state doctrine, none of the defendents did so, assuredly for the reason that these issues do not exist in this proceeding. Cf., *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1979); *aff'd,* 461 F.2d 1261 (9th Cir. 1972). Indeed, the Foreign Sovereign Immunity Act (28 U.S.C. §1605 (a) (2) would allow suit against the British Government for the *Commercial* activities here complained of. See, *Ramamurti v. Rolls-Royce, Ltd.*, 454 F.Supp. 407 (D.C. D.C. 1978); *Outboard Marine Corp. v. Pezetel,* 474 F.Supp. 168 (D.C. Del. 1978)

v. Diebold, ... F.Supp. .... (N.D. Ohio 1978) [1978-2 Trade Cases, paras. 61,831 & 61,832]; *Outboard Marine Corp. v. Pezetel,* 474 F.Supp. 168 (D.C. Del. 1978); *Athletes Foot of Del. v. Ralph Libonti Co.,* 445 F.Supp. 335 (D.C. Del. 1978); *El Cid Ltd. v. The New Jersey Zinc Co.,* 444 F.Supp. 845 (S.D.N.Y. 1977).

It is important to the administration of justice for this Court to grant the Writ. There is an ever increasing number of acquisitions in the United States by foreign corporations. The decision of the Court of Appeals virtually immunizes scrutiny of the parent for post-acquisition conduct, even though such an acquiring company may be enjoined from acquiring at all.

The confusion of the lower courts is a symptom of too wide discretion. The Courts of Appeal are apparently as confused as the District Courts. It is for this Court to provide the framework for an ordered analysis.

CONCLUSION.

Wherefore, it is respectfully submitted that the Writ of Certiorari issue as prayed.

Respectfully submitted,

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and

HOCKMAN, SALKIN & DEROY,
A Professional Corporation.

APPENDIX.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Kramer Motors, Inc., a California Corporation, Plaintiff/Appellant, vs. British Leyland, Ltd., British Leyland International Ltd. and British Leyland Motor Corporation, Ltd., Defendants/Appellees. No. 78-3332, DC CV 78-8 HBT.

Filed and entered April 1, 1980.

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Order.

United States District Court, Southern District of California.

Kramer Motors, Inc., a California Corporation, Plaintiff, vs. British Leyland, Ltd., British Leyland International Ltd., and British Leyland Motor Corporation, Ltd., Defendants. Case No. 78-0008-T.

Filed: Sept. 5, 1978.

The motions of defendants BRITISH LEYLAND, LTD., BRITISH LEYLAND INTERNATIONAL, LTD., and BRITISH LEYLAND MOTOR CORPORATION, a corporation, to dismiss the complaint for lack of jurisdiction over defendants or in the alternative, to transfer venue, came before this Court on August 21, 1978, the Honorable How-

ard B. Turrentine, United States District Judge presiding, and the Court having considered the papers filed in support of and in opposition to said motions and having heard the argument of counsel,

IT IS HEREBY ORDERED:

1. The defendants' motion to dismiss for lack of personal jurisdiction is hereby granted with respect to all of the named defendants, and the action is hereby dismissed.

2. In the alternative, even if it were ever determined on appeal that this Court has personal jurisdiction over said defendants, this is a proper case for transfer or venue to the Central District of California pursuant to Title 28, United States Code §1404(a) and said transfer is hereby so ordered.

3. The defendants' motion to dismiss on the grounds of res judicata and collateral estoppel is mooted by the foregoing orders.

DATED: 9/5/78.

/s/ HOWARD B. TURRENTINE
Howard B. Turrentine
United States District Judge.

Prepared by:

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Opinion.

United States Court of Appeals for the Ninth Circuit.

Kramer Motors, Inc., a California corporation, Appellant, v. British Leyland, Ltd., British Leyland International, Ltd., and British Leyland Motor Corporation, Ltd., Appellee. No. 78-3332. DC No. Civil 78-0008-T.

Filed: April 11, 1980.

Appeal from the Southern District of California. Howard B. Turrentine, District Judge, presiding. Argued and submitted January 8, 1980.

Before: JUDGES GOODWIN and ANDERSON, Circuit Judges, and EAST,* District Judge.

PER CURIAM: Kramer Motors, Inc., a Santa Monica imported automobile dealer, lost its supply of Triumph automobiles in 1974 after the importer, British Leyland Motors, Inc. (BLMI), revised its marketing plan for British Leyland cars in the United States. In addition to other litigation,[1] Kramer commenced this action against three Brit-

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]In a separate action, *Kramer Motors, Inc. v. British Leyland Motors, Inc., et al*, No. 78-1303, argued and submitted January 8, 1980 (9th Cir.), Kramer had earlier brought conspiracy claims against various American corporations, including:

(1) British Leyland Motors, Inc. (BLMI), the importer wholly owned by British Leyland International, Ltd.;

(2) Leyland Motor Sales, Inc. (LMS), a dealer wholly owned by BLMI; and

(3) British Motor Car Distributors, Inc., the dealer which took over southern California Triumph distribution from LMS, and which thereafter declined to offer Kramer a contract.

Both lawsuits arose from the "nonrenewal" of Kramer's dealer contract.

ish Corporations[2] which Kramer claimed had conspired to put it out of business in violation of federal law. Kramer appeals a judgment of dismissal for want of jurisidiction.

In *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977), we reviewed the due process demands of in personam jurisdiction.

> "[T]wo principal factors must be considered in determining whether a court may constitutionally exercise personal jurisdiction over a given corporate defendant: the significance of the defendant's contacts with the forum and the relationship of the cause of action to those forum contacts. * * * If the defendant corporation has sufficient deliberate 'minimum contacts' with the forum state, a court may acquire in personam jurisdiction over it in actions which arise from those contacts. If, however, a corporation's activities in the forum are so 'continuous and systematic' that the corporation may in fact already be said to be 'present' there, it may also be served in causes of action unrelated to its forum activities." *Id.* at 412-413.

In *Wells Fargo, id.* at 418, we recognized that when a federal statute such as 15 U.S.C. § 22 authorizes worldwide service of process, *it may be proper*[3] to consider whether

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[2]The defendants are:

(1) British Leyland Ltd. (BLL), the top holding company for separate manufacturers and marketers of British Leyland products. The United Kingdom government owns 95 percent of BLL.
(2) British Leyland Motor Corporation, Ltd. (BLMC), the top holding company at the time Kramer's dealer contract terminated. (BLL now owns BLMC.)
(3) British Leyland International, Ltd. (BLIL), the overseas marketer of British Leyland products at the time Kramer's contract terminated. BLIL then owned BLMI, the United States importer.

[3]The court did not have occasion to decide the issue, since the statute before it, the Lanham Act, granted no such broad service of process powers.

an alien defendant's contacts with the entire United States provide adequate grounds for asserting personal jurisdiction consistent with due process. *See Driver v. Helms*, 577 F.2d 147, 154-157 (1st Cir. 1978), *rev'd on other grounds, Stafford v. Briggs*, 48 U.S.L.W. 4138 (U.S. Feb. 20, 1980) (Nos. 77-1546 and 78-303); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1339-1343 (2d Cir. 1972). Kramer urges us to thus "aggregate" the defendants' United States contacts for the purpose of deciding this case. *But even were we to do so, we would find that Kramer has failed to show contacts sufficient to support jurisdiction upon any of its several theories.*[4]

"Presence" Through an "Agent" or "Alter Ego"

The record reveals the following: At various times, some directors of the British defendants have sat on the board of BLMI, the United States importer subsidiary. From 1971 to 1975 the president of BLMI served as a director of BLIL, its British parent (see n.2). At times relevant to this action, BLIL was generally responsible for the sale of British Leyland products outside the United Kingdom, had general executive responsibility for the operation of BLMI, and reviewed and approved its major policy decisions. BLIL has guaranteed obligations of BLMI to United States banks. Executives of the British companies work closely with executives of BLMI on pricing of vehicles for the United States market and sometimes travel to the United States for talks on pricing. United States residents, through a "personnel export screen," can originate a car purchase through BLMI, then go to Europe on vacation, pick up the car there and bring it back to the United States. BLIL approved the

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[4]Thus, we need not decide, in this case, whether aggregation is proper.

BLMI proposal for consolidating distribution of British Leyland vehicles within the United States.

These facts are insufficient to make BLMI an "alter ego" or "agent" of any of the British corporations so as to make any of them subject to jurisdiction solely through BLMI's presence in the United States. *See Wells Fargo, supra,* 556 F.2d at 419-422. The record does not show that executives and directors of the British corporations ever controlled the BLMI board or formed a board majority. None of the United Kingdom companies controls[5] the internal affairs of BLMI or determines how it operates on a daily basis. BLMI has primary and exclusive responsibility for the distribution, marketing, and sale of British Leyland vehicles, parts, and accessories within the United States. BLIL did not implement or supervise the reorganization plan. It proposed no changes in the plan. The parent and subsidiary have dealt with each other as distinct corporate entities.

"Minimum Contacts"

In addition to the above facts, the record shows the following United Kingdom-United States British Leyland contact: One company "within British Leyland" is party to a contract to distribute tractors in the United States. Another supplies marine engines to a company in the Boston area. A third once sold eight double-decker buses to the New York Metropolitan Transit Authority. The three companies are not defendants in this action. These contacts, together

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[5]This and the following sentence are written in the present tense because defendants used the present tense in responding to Kramer's interrogatory. The interrogatory, however, sought responses "for each of the years 1966 to date." Defendants stated that they would give answers for the period from February 1968 through December 1977. Thus, we can fairly read their answers, though worded in the present, to cover that entire period. Even if the answers do apply only to the present, the record does not support a different conclusion for years past.

with the presence in the United States of BLIL's subsidiary BLMI, *see* discussion *supra*, do not show such "continuous and systematic activity" in the United States by BLMC, BLIL, or BLL (see n.2) as would subject any of them to jurisdiction on a cause of action unrelated to the activity.

Even a single contact, however, may support personal jurisdiction over a defendant in an action arising out of that particular contact. A foreign act having an affect in the forum may satisfy the minimum contact requirement. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). But in each such case the defendant must have done some act by shich it purposely avails itself of the benefits and protections of forum law. *Kulko v. Superior Court*, 436 U.S. 84, 93-94 (1978); *see Wells Fargo, supra*, 556 F.2d at 413.

The record discloses no act by BLL or BLMC which gave rise to this cause of action. BLIL, however, did approve (an act) the marketing scheme which when implemented eventually caused Kramer to lose its supply of Triumph automobiles (the effect). BLIL and BLMI obviously shared an interest in promoting British Leyland car sales. But the British parent's mere approval of a marketing scheme developed by its United States subsidiary does not constitute the kind of deliberate forum-protection invoking act which the law requires.

The United States Court of Appeals for the Second Circuit has stated that the foreign-acts-with-forum-effects jurisdictional principle "must be applied with caution, particularly in an international context." *Leasco Data Processing Equipment Corp. v. Maxwell, supra*, 468 F.2d at 1341. The British government's 95 percent ownership of BLL warrants

particular caution in this case, as it provokes questions regarding the capacity of United States courts to review the validity of foreign acts of state. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416-439 (1964).

Affirmed.

Notice of Entry of Judgment.

Office of the Clerk, United States Court of Appeals for the Ninth Circuit.

Judgment was entered in this case as of the file stamp date on the attached decision of the court.

Petition for Rehearing (FRAP 40)

A petition for rehearing may be filed within 14 days from the entry of judgment. A petition should not be filed in order to reargue the case but should only be filed to direct attention to material facts of law possibly overlooked in the decision. The 15 page limit allowed by the rule must be observed. In addition, 3 copies of the petition are required unless the petition includes a suggestion for rehearing en banc (in such instances 24 copies are required in addition to the original). The petition should of course be directed to the Clerk of the Court. A petition for rehearing must be submitted on 8 1/2 x 11 inch paper, must show complete proof of service to all parties, and the original must contain an original signature of the counsel/pro per litigant submitting the petition.

Bill of Costs (FRAP 39)

See Rule 39 of FRAP for information as to which party is allowed costs on appeal. If a party is allowed costs, the bill of costs must be filed within 14 days from the entry of judgment. Objections to the bill of costs by an adversary party must be filed within 7 days thereafter.

Issuance of the Mandate (FRAP 41)

The mandate is the certified copy of the judgment. The mandate is scheduled to be issued 21 days from the entry of judgment unless the court directs otherwise. A *timely* petition for rehearing will stay the issuance of the mandate.

If the petition is denied, the mandate will be entered 7 days later. A direct motion for stay of mandate must be filed in an original plus three copies.

Petition for Writ of Certiorari

For information concerning the filing of this petition, refer to the rules of the Supreme Court of the United States.

CA9-086 (9/17/79)

Order Amending Opinion.

United States Court of Appeals for the Ninth Circuit.

Kramer Motors, Inc., a California corporation, Appellant, v. British Leyland Ltd.; British Leyland International, Ltd; and British Leyland Motor Corporation, Ltd., Appellee. No. 78-2791.

Filed: May 30, 1980.

Before: GOODWIN and ANDERSON, Circuit Judges, and EAST, District Judge*

The opinion issued herein on April 1, 1980, is amended as follows:

On page 4, line 28, typewritten opinion (page 2549, second column, end of second full paragraph), after the word "requires." add: *World-Wide Volkswagen Corporation v. Charles S. Woodson,* .... U.S. .... , 62 L.Ed2d 490, 100 S.Ct. 559 (1980).

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

United States Court of Appeals for the Ninth Circuit.

Kramer Motors, Inc., a California Corporation, Appellant, v. British Leyland Ltd.; British Leyland International, Ltd.; and British Leyland Motor Corporation, Ltd., Appellee. No. 78-3332.

Filed: June 3, 1980.

The caption of the May 30, 1980 order amending the opinion is corrected to show the above case number in place of 78-2791.

BY ORDER OF THE COURT:

Richard H. Deane
Clerk of Court
/s/ CHRISTOPHER W. VASIL
By: Christopher W. Vasil
Senior Deputy Clerk

Order.

United States Court of Appeals for the Ninth Circuit.

Kramer Motors, Inc. a California corporation, Appellant, v. British Leyland Ltd., et al. Appellees. No. 78-3332.

Filed: April 28, 1980.

Before: GOODWIN and ANDERSON, Circuit Judges, and EAST, District Judge.*

Appellees shall have 21 days from the date of this order to respond to appellant's petition for rehearing and suggestion for rehearing en banc filed herein on April 11, 1980.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Order.

United States Court of Appeals for the Ninth Circuit.

Kramer Motors, Inc., a California corporation, Appellant, vs. British Leyland Ltd.; British Leyland International, Ltd.; and British Leyland Motor Corporation, Ltd., Appellees. No. 78-3332.

Filed: June 19, 1980.

Before: GOODWIN and ANDERSON, Circuit Judges, and EAST,* District Judge.

On April 11, 1980, appellant filed its petition for rehearing and suggestion for rehearing en banc.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a hearing en banc is rejected.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Statutes Involved.

15 U.S.C. §1

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C. §8

§ 8. Trusts in restraint of import trade illegal; penalty.

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Aug. 27, 1894, c. 349, § 73, 28 Stat. 570; Feb. 12, 1913, c. 40, 37 Stat. 667.

15 U.S.C. §14

§ 14. Sale, etc., on agreement not to use goods of competitor.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitiors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Oct. 15, 1914, c 323, § 3, 38 Stat. 731.

15 U.S.C. §15

§ 15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

15 U.S.C. §17

§ 17. Antitrust laws not applicable to labor organizations.

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

15 U.S.C. §22

§ 22. District in which to sue corporation.

Any suit, action, or proceeding under the antitrust laws against a corporation, may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Oct. 15, 1914, c. 323, § 12, 38 Stat. 736.

15 U.S.C. §26

§ 26. Injunctive relief for private parties; exception.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause

loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

Order.

In the United States Court of Appeals for the Ninth Circuit.

Kramer Motors, Inc., a Calif. corporation, Plaintiff-Appellant, vs. British Leyland Motors, Inc., et. al., Defendants-Appellees. No. 78-1303. DC No. 76-1224 LTL.

Filed: June 4, 1980.

On Appeal from the United States District Court from the Central District of California. The Honorable Lawrence T. Lydick, Presiding.

Before: GOODWIN and ANDERSON, Circuit Judges, and EAST,* District Judge.

The summary judgment granted in favor of the defendants was premature in light of *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429 (9th Cir. 1979). The *Sherman* case was decided after the district court had ruled in the case at bar. We remand for further proceedings in light of *Sherman*. In so remanding, we express no opinion on the ultimate merits of the litigation.

IT IS SO ORDERED.

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*The Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

Amended Order.

United States Court of Appeals for the Ninth Circuit.

Kramer Motors, Inc., a Calif. corporation, Plaintiff-Appellant, vs. British Leyland Motors, Inc., et. al., Defendants-Appellees. No. 78-1303. D.C. No. 76-1224 LTL.

Filed: June 30, 1980.

On Appeal from the United States District Court for the Central District of California. Lawrence T. Lydick, District Judge. Argued and submitted January 8, 1980.

Before: GOODWIN and ANDERSON, Circuit Judges, and EAST,* District Judge.

The summary judgment granted in favor of the defendants was premature in light of *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429 (9th Cir. 1979). The *Sherman* case was decided after the district court had ruled in the case at bar. The dismissal of the claim against Hornburg is also vacated. Costs should be deferred until after the final judgment.

We remand for further proceedings in light of *Sherman*. In so remanding, we express no opinion on the ultimate merits of the litigation.

IT IS SO ORDERED.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

No. 80-588

Supreme Court, U. S.
FILED
NOV 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

KRAMER MOTORS, INC., a California corporation,

Petitioner,

vs.

BRITISH LEYLAND, LTD., BRITISH LEYLAND INTERNATIONAL, LTD., and BRITISH LEYLAND MOTOR CORPORATION, LTD.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF

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November 10, 1980

TABLE OF CONTENTS

PAGE

Statement of the Case 1

Reasons for Denying the Writ 3

ARGUMENT 4

A. It is constitutionally required that a defendant not actually "present" in the jurisdiction at least have "minimum contacts" before in personam jurisdiction may be established 4

B. Petitioner has misread the decision below as requiring that a subsidiary be the alter ego of its parent in order to establish personal jurisdiction over the parent 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Blount v. *Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695 (2d Cir. 1963) 7

Cannon Manufacturing Co. v. *Cudahy Packing Co.*, 267 U.S. 333, 336-337 (1925) 7

Colbert v. *Peerless Chemicals (P.R.) Inc.*, 375 U.S. 831 (1963) 7

Energy Reserves Group, Inc. v. *Superior Oil Co.*, 460 F.Supp. 483 (D.Kan. 1977) 5

Escude Cruz v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980) 7

PAGE

Hanson v. *Denckla*, 357 U.S. 235, 246 (1958) 6n

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 4, 6n

Shaffer v. *Heitner*, 433 U.S. 186, 204 (1977) 4

Sherman v. *British Leyland Motors, Ltd.*, 601 F.2d 429 (9th Cir. 1979) 2

Wells Fargo & Co. v. *Wells Fargo Express Co.*, 556 F.2d 406, 413 (9th Cir. 1977) 5

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 5, 6n

Statutes:

United States Code, Title 15, Sec. 1221 2

United States Code, Title 28, Sec. 1404(a) 3n

In the

Supreme Court of the United States

October Term, 1980

No. 80-588

Kramer Motors, Inc., a California corporation,

Petitioner,

vs.

British Leyland, Ltd., British Leyland International, Ltd., and British Leyland Motor Corporation, Ltd.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF

Statement of the Case

The relevant facts are sufficiently stated in the petition and in the opinion below. However, a brief word should be said about the related litigation between petitioner and the U.S. subsidiaries of respondents.

Petitioner is a retail dealer in imported automobiles in Santa Monica, California. The lines handled in 1973 included Volvo, Honda and Fiat, together with Triumph, manufactured in the United Kingdom by these respondents.

Seeking to consolidate its fragmented distribution and marketing, the British Leyland U.S. subsidiary adopted a "rationalization" program—approved by one of the respondents, as petitioner says—to consolidate wholesale distri-

bution. The new single distributor in southern California, which replaced three separate distributors, advised petitioner that when its Triumph franchise expired, the Triumph line would be moved to a nearby dealer who handled the other British Leyland marques (Jaguar and MG). Two lawsuits followed.

Kramer I. Petitioner first sued the U.S. members of the British Leyland Group, plus the new full-line distributor in southern California, plus the new retail dealer. It sought damages under the Automobile Dealers' Day in Court Act (15 U.S.C. § 1221) and the antitrust laws, primarily the Sherman Act (quoted in Appendix to Petition [hereafter "App."] 15). The action, filed in the Central District of California, was dismissed by the district court on summary judgment.

Kramer II. Petitioner then started a new action, involving the same facts but containing only antitrust claims, against the top U.K. companies in the British Leyland Group. That is this case, and respondents are those companies. The action was brought in San Diego, clearly to avoid being referred to the same judge in Los Angeles who had already dismissed Kramer I. The San Diego court dismissed Kramer II on the ground of lack of jurisdiction over the person of the foreign defendants (App. 2).

Both dismissals were appealed. In Kramer I, the Ninth Circuit reversed the dismissal *per curiam*, calling it "premature" in light of the decision of another panel of that court in a similar action brought by another discontinued Triumph dealer (App. 21). *Sherman* v. *British Leyland Motors, Ltd.*, 601 F.2d 429 (1979). Expressing "no opinion on the ultimate merits of the litigation" (App. 21), the court returned Kramer I to the district court in Los Angeles. A briefing and argument schedule has been set up, and it is likely that Kramer's claims will be resolved one

way or the other long before this Court could ever decide whether the antitrust claims may also be asserted against the U.K. companies.[1]

Reasons for Denying the Writ

Petitioner has not suggested any of the traditional grounds for granting certiorari. There is no claim of conflict among circuits, nor any claim that the Ninth Circuit decided the jurisdictional question in conflict with applicable decisions of this Court. A recital of district court antitrust decisions involving jurisdiction over foreign defendants, and the forecast that the decision below may create "confusion" (Pet. 13-14) do not meet the considerations listed in Rule 17.

Petitioner's assertion that the court below displayed undue "solicitousness" for the British defendants, at the sacrifice of "fairness" (Pet. 13), is unsupported. While petitioner speaks darkly of the mischief that will be abroad if foreign suppliers to the U.S. market are allowed a safe haven outside U.S. borders to violate U.S. antitrust laws at will, this is overblown rhetoric. It is not easy for this petitioner to convince anyone that the loss of the Triumph line—amounting to about 6% of its business[2]—was because of the machinations of a foreign automobile cartel.

Limiting this brief to the "Question Presented," we accept that the existence of U.S. companies to deal with, and

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[1] Kramer II (this case) has been transferred to Los Angeles by the San Diego court under 28 U.S.C. § 1404(a), so that if the jurisdictional dismissal is reversed, Kramer II will be heard by the same judge now preparing to hear Kramer I.

[2] In 1973 petitioner sold 429 Volvos, 192 Hondas, 187 Fiats and 54 Triumphs. In 1974, with Triumph moved to another dealer, Kramer added over 300 additional sales of its three other lines (Pltf's Interr. Ans. No. 3, 1 CT I 101).

if necessary respond to, petitioner's antitrust challenge is not alone a ground for refusing to accept jurisdiction over the foreign parents of the U.S. wrongdoers. But it is inappropriate, in view of the two cases that petitioner has been simultaneously pushing, to make it appear that petitioner will be turned away empty-handed unless the decision below is reversed.

ARGUMENT

A. It is constitutionally required that a defendant not "present" in the jurisdiction at least have "minimum contacts" before in personam jurisdiction may be established.

Such is the classic rule of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), requiring that the maintenance of a suit against foreign defendants shall not offend traditional notions of fair play and substantial justice (p. 316), and shall be "reasonable" (p. 317). Evaluation of the defendant's activity in the forum must not be mechanical or quantitative, but must be based upon a determination whether the "quality and nature of the activity in relation to the fair and orderly administration of the laws" (p. 319) allow *in personam* jurisdiction in accordance with due process requirements. See *Shaffer* v. *Heitner,* 433 U.S. 186, 204 (1977). As the court below phrased it in its leading decision in the area, which it followed in this case:

> "If the defendant corporation has sufficient deliberate 'minimum contacts' with the forum state, a court may acquire *in personam* jurisdiction over it in actions which arise from those forum contacts. If, however, a corporation's activities in the forum are so 'continuous and systematic' that the corporation may in fact be said already to be 'present' there, it may also be served

in causes of action unrelated to its forum activities." *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406, 413 (9th Cir. 1977).

Even the district court decision relied upon by petitioner, *Energy Reserves Group, Inc.* v. *Superior Oil Co.*, 460 F.Supp. 483 (D.Kan. 1977), prefaces the discussion quoted by petitioner with references to "concepts of fundamental fairness and substantial justice" (p. 489) and the "fairness" of making the foreign defendant "defend itself in this forum" (p. 490). It is all very well to speak of "affiliating circumstances," but the threshold question always remains: Is it *fair* to make the defendant appear in this jurisdiction?

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980), was the basis for the motion for a rehearing below, on the ground that the court had overlooked or misapprehended the *World-Wide* decision. Much the same argument is repeated here. *World-Wide*, it is true, minimized the importance of inconvenience to the foreign defendant as a factor to be considered in a day of rapid travel and communications, but it reaffirmed traditional notions of fairness. How can it be unfair to this petitioner to deny it the right to drag in the British parent, when there are U.S. parties ready to appear and defend the action they took, and to pay damages if they are found to be wrong?

B. Petitioner has misread the decision below as requiring that a subsidiary be the alter ego of its parent in order to establish personal jurisdiction over the parent.

Petitioner asserts that the court held that "it was necessary that BLMI (U.S.) be the 'alter ego' of the British corporations" before personal jurisdiction over the latter could be established (Pet. 4, 8). It also contends that the court erroneously applied a quantitative rather than qual-

itative analysis in its consideration of defendants' ties with the forum (Pet. 5). Neither contention is borne out.

The opinion below first searched for any defendant's presence in the forum through an "agent" or "alter ego" (App. 5-6). It found none. Next, it looked for, and failed to find, any presence based upon the distribution of tractors, marine engines and double-decker buses by other companies within the British Leyland Group, *combined* with the presence of a subsidiary company in this country (App. 6-7).

Lastly, the opinion examined "minimum contacts" as a basis on which to premise jurisdiction. These would have to give rise to plaintiff's action to be relevant (App. 7). The panel observed that *one* defendant approved its U.S. subsidiary's marketing scheme, but concluded that so negligible an act would not constiute the "kind of deliberate forum-protection invoking act which the law requires." [3] The other two defendants did nothing at all which even arguably "gave rise to this cause of action."

There is no "logical imprecision" (Pet. 12) in the court's analysis. No defendant has any presence in the forum or any contact giving rise to plaintiff's cause of action; hence there exists no "minimum contact" or "affiliating circumstance," as plaintiff sometimes puts it,[4] on which to premise personal jurisdiction. There is no basis in law for any suggestion by petitioner that "minimum contacts" by a defendant corporation may be established by showing only

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[3] The court later added a citation to *World-Wide* at this point in its *per curiam* opinion (App. 11).

[4] Petitioner appears to suggest that a new notion of "affiliating circumstances" has succeeded *International Shoe's* requirement of "minimum contacts" (Pet. 6, 10, 12). Actually, the phrase "affiliating circumstances" first appeared in *Hanson* v. *Denckla*, 357 U.S. 235, 246 (1958), as a synonym for "minimum contacts." (It also appears with this meaning in Mr. Justice White's opinion in *World-Wide*, 444 U.S. at 295.)

that an "affiliated corporation" had contacts with the forum. The mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresident parent, even if the parent is the sole owner of the subsidiary. *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 336-337 (1925); *Blount* v. *Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695, 699 (2d Cir. 1963), *cert. denied sub nom., Colbert* v. *Peerless Chemicals (P.R.) Inc.*, 375 U.S. 831 (1963); *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980).

Even after aggregating the defendants' United States contacts for the purpose of deciding this case, the Court of Appeals concluded that there were insufficient contacts to support jurisdiction on any of plaintiff's theories (App. 5).[5]

CONCLUSION

It may be, as petitioner contends, that questions of jurisdiction of antitrust claims against foreign manufacturers selling their products in the U.S. may some day require resolution by this Court. Surely this is not the case in which that question is to be addressed.

Respectfully submitted,

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[5] The panel aggregated the United States contacts only for the purpose of showing that even if it did so, as plaintiff urged, jurisdiction could not be established. The court did not reach the question whether aggregation was proper (App. 5 at n. 4).